No. 96-7901

(4)

Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

RICHARD F. TREST,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

REBECCA L. HUDSMITH*
Federal Public Defender
for the Middle and
Western Districts of
Louisiana
102 Versailles Blvd.,
Suite 816
Lafayette, Louisiana 70501
Telephone: (318) 262-6336
Facsimile: (318) 262-6605

Counsel for Petitioner
Richard F. Trest

**Counsel of Record*

RICHARD P. IEYOUB
Attorney General
KATHLEEN E. PETERSEN*
Assistant Attorney General
MARY E. HUNLEY
Assistant Attorney General
State of Louisiana Department
of Justice
P.O. Box 94095,
Capitol Station
Baton Rouge, Lousiana
70804-9095
Telephone: (504) 342-7552
Facsimile: (504) 342-7893

Counsel for Respondent
Burl Cain

Petition For Certiorari Filed January 27, 1997
Certiorari Granted May 27, 1997

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102 pp

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
08/30/91	Motion by Richard F. Trest to proceed in forma pauperis with Proposed Order referred to Magistrate Roy S. Payne
09/06/91	Order granting in part, denying in part motion to proceed in forma pauperis; IFP granted upon payment of $5 filing fee (signed by Magistrate Roy S. Payne)
09/30/91	Filing fee paid; filing fee $5 receipt #50963. Case referred to Magistrate Roy S. Payne
09/30/91	Petition for writ of habeas corpus
12/19/91	Memorandum Order; directing Clerk to serve respondent, Atty General and Dist Atty; Answer due w/I 30 days of svc, afterwhich pltf allowed 20 days to respond; All future pleadings shall have cert of svc (signed by Magistrate Roy S. Payne)
01/9/92	Answer to Complaint by Warden La State Pen
01/24/92	Response by Richard F. Trest in opposition to answer
01/28/93	Case referred to Magistrate Judge Roy S. Payne for Report and Recommendation
02/02/94	Report and Recommendations by Magistrate Judge Roy S. Payne that habeas be denied. Objections to R and R due by 2/16/94
02/18/94	Objection by Richard F. Trest to report and recommendations

05/16/94 Judgment ordered that petitioner's application for writ of habeas corpus is denied

05/16/94 Case closed

05/26/94 Notice of Appeal by Richard F. Trest from judgment order entered 5/16/94 by Judge Tom Stagg

05/26/94 Motion by Richard F. Trest for certificate of probable cause with Proposed Order referred to Judge Tom Stagg

06/20/94 Certificate of probable cause denying motion for certificate of probable cause (signed by Judge Tom Stagg)

STATE OF LOUISIANA
EX REL, RICHARD
FRANKLIN TREST,

PETITIONER,

VERSUS

LARRY SMITH,
WARDEN, LOUISIANA
STATE PENITENTIARY,

RESPONDENT.

DATED FILED: _____

NO. 56,595

26TH JUDICIAL
DISTRICT COURT

PARISH OF BOSSIER

STATE OF LOUISIANA

BY: _____
CLERK OF COURT

MOTION TO CORRECT ILLEGAL SENTENCE
(LA. C.CR.P. ART. 882)
(ENHANCEMENT PROCEEDINGS)

(Filed Jan. 17, 1990)

PREPARED BY:

LEGAL AID OFFICE
CAMP C
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA 70712

SUBMITTED BY:

/s/ Richard Franklin Trest

RICHARD FRANKLIN TREST
PETITIONER PRO SE
911171 CAMP C, TIGER 3-R-7
LOUISIANA STATE PENITENTIARY

APPENDIX "A"

Adopted October 14, 1976
Effective January 1, 1977

UNIFORM APPLICATION FOR
POST-CONVICTION RELIEF

RICHARD FRANKLIN TREST
NAME OF PETITIONER

No. 56,595
(to be filled in by the clerk)

91171
PRISON NUMBER

26th JUDICIAL DISTRICT

___ PARISH OF BOSSIER
STATE OF LOUISIANA

LSP, ANGOLA, LOUISIANA
PLACE OF CONFINEMENT

vs.

LARRY SMITH,
WARDEN,
CUSTODIAN (Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

Please Serve CUSTODIAN and A.L. BLONDEAUM ASSISTANT DISTRICT ATTORNEY, 26th JUDICIAL DISTRICT, STATE OF LOUISIANA.

* * *

PETITION

1. Name and location of court which entered the judgment of conviction challenged 26th Judicial District Court, Bossier Parish, Benton, Louisiana.

2. Date of judgment of conviction June 8, 1979.

3. Length of sentence Thirty-five (35) years without benefit of parole, probation, or suspension of sentence.

4. Nature of offense involved (all counts) Multiple Offender (R.S. 15:529.1) Second Offender

5. What was your plea? (check one)

   (a) Not guilty (X)

   * * *

   (b) Name and address of the lawyer representing you at your plea (if you had no lawyer, please indicate) Patrick Phillips, Indigent Defender Program, Benton, Louisiana.

   (c) Was the lawyer appointed (X) or hired ( )? (check one)

6. Kind of trial: (check one)

   (a) Jury ( )

   (b) Judge only (X) NOTE: This was an enhancement proceeding.

7. (a) Name and address of the lawyer representing you at your trial: Same as above

   (b) Was the lawyer appointed (X) or hired ( )? (check one)

8. Did you testify at the trial? Yes ( ) No ( ) ** NOTE: "Yes" at RobberynTrial [sic] – "NO" at HFC Trial.

9. (a) Give the name and address of the lawyer who represented you at sentencing for the conviction being attacked herein. Same as above.

   (b) Was the attorney appointed (X) or hired ( )? (check one)

10. Did you appeal from the judgment of conviction? Yes ( ) No ( ) *** This is unknown to Petitioner.

* * *

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any application for post-conviction relief with respect to this judgment in any state or federal court. Yes ( ) No (X)

* * *

CLAIM[S]

YOU MAY ATTACH ADDITIONAL PAGES SETTING FORTH THE REQUIRED INFORMATION (BELOW) IF ADDITIONAL CLAIMS ARE ASSERTED.

Claim: THE ENTIRE MULTIPLE OFFENDER PROCEEDINGS WERE IN VIOLATION OF LSA-R.S. 15:529.1.

(a) Supporting FACTS (tell your story briefly without citing cases or law): See attached Memorandum of Law for facts, claims, and legal argument.

(b) List names and addresses of witnesses who could testify in support of your claim. If you cannot do so, explain why:
1. Trial Record.

(c) If you failed to raise this ground in the trial court prior to conviction, on appeal or in a prior application, explain why: The Multiple Offender proceedings was protested during trial. It is unknown to Petitioner if any appeal was taken on this issue.

A. Do you have in a state or federal court any petition or appeal now pending as to the Judgment challenged? Yes ( ) No (X) If "yes", name the court

B. Do you have any future sentence to serve after you complete the sentence imposed by the judgment challenged? Yes (X) No ( )

(1) If so, give name and location of court which imposed sentence to be served in the future: 20th Judicial District Court, West Feliciana Parish, St. Francisville, La.

(2) Give date and length of sentence to be served in the future: 9-4-86 – Attempted Escape – One (1) year.

(3) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (X)

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled.

/s/ Richard F. Trest
Signature of Petitioner

9 (Day/) 1 (Month) 1990. (/Year)

STATE OF LOUISIANA EX REL, RICHARD FRANKLIN TREST,	NO. 56,595
PETITIONER,	26TH JUDICIAL DISTRICT COURT
VERSUS	
LARRY SMITH, WARDEN, LOUISIANA STATE PENITENTIARY,	PARISH OF BOSSIER
RESPONDENT.	STATE OF LOUISIANA

MEMORANDUM OF LAW

1.

STATEMENT OF JURISDICTION

This application is a Motion To Correct An Illegal Sentence challenged herein, and for the reasons appearing, infra, filed herein pursuant to the authority of La. C. Cr. P. Article 882 which states that "an illegal sentence may be corrected at any time by the court that imposed the sentence", and La. C. Cr. P. Article 930.3, which enables a defendant who has been sentenced in violation of the Constitution of the United States and of the State of Louisiana to have a sentence set aside in a Post-Conviction Relief Application.

2.

STATEMENT OF THE CASE

Petitioner, RICHARD FRANKLIN TREST, was charged by Bill of Information for Armed Robbery, a violation of LSA-R.S. 14:64. After a trial by 12 man jury

with Court-Appointed Counsel, Mr. Patrick Phillips, Petitioner was convicted as charged on March 29, 1979. The State then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging Petitioner as a Second Offender. See Exhibit "A" attached hereto. Petitioner was subsequently convicted and sentenced to an enhancement term of thirty-five (35) years without benefit of *parole*, probation, or suspension of sentence by the Honorable Cecil C. Lowe, Judge, on June 8, 1979. See Exhibit "B" attached hereto[1].

Petitioner now attacks the entire Multiple Offender proceedings as being contrary to R.S. 15:529.1 in this litigation.

STATEMENT OF THE CLAIMS

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by the prosecutor.

2. The Trial Court failed to inform Petitioner of the right to be tried as to the truth of the Multiple Offender Bill of Information and as to a "formal hearing".

3. The Trial Court failed to inform Petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true.

4. The Trial Court erred by allowing Defense Counsel to enter the not guilty plea to said charge.

---

[1] See Multiple Offender Transcript attached hereto and referred to as "Tr. ___" from this point onward.

5. The Trial Court failed to advise Petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions.

6. There was insufficient evidence produced during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.

7. The evidence introduced by the State as to prior felony convictions was illegally entered into evidence.

8. The Trial Court erred by ordering said Second Offender sentence to be without parole.

9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-C.Cr.P. Article 894.1.

ARGUMENT

Because the Multiple Offender issues involved in this petition are interrelated they will not be bifurcated herein and will be argued collectively.

The Multiple Offender Statute, LSA-R.S. 15:529.1(D), states in pertinent part:

> ". . . . Whereupon the court in which the subsequent conviction was had *shall* cause the person, whether confined in prison or otherwise, to be brought before it and *shall* inform him of the allegations contained in the information and of his right to be tried to the truth thereof according to law and *shall* require the offender to say whether the allegations are true."

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by

the prosecutor. At Tr. 5-6 the prosecutor, Mr. Alexander L. Blondeau, Jr., testified that he had threaten to Multibill Petitioner if he did not plead guilty to the Armed Robbery charge and stated at Tr. 6:

> "A. If he was convicted and went to trial, I said I would file a Multiple Offender Bill and I have honored my promise to you."

The only issue raised by the Defense before the jury was whether Petitioner committed Armed Robbery or Simple Robbery. There was no doubt of guilt in the case – just the grade of guilt and the grade of crime was the core of the trial. Petitioner was willing to plead guilty to Simple Robbery, but the prosecutor refused to accept the plea and wanted a guilty plea to Armed Robbery with no plea bargain.

Petitioner relied on *Hayes v. Cowan*, 547 F. 2d 42 (5th Cir. 1976), which provides in pertinent part:

> "Prosecutor may not charge habitual offender act against prisoner for refusing to plead guilty to lesser offense and demanding trial."

Accordingly, the Trial Court erred in not quashing the Multiple Offender Bill of Information as being vindictive.

2. The Trial Court failed to inform Petitioner of the right to be tried as to the truth of the Multiple Offender allegations. In *State v. Johnson*, 432 So. 2d 815 (La. 1983), the multiple offender record must show that the offender was told by the Trial Judge of the right to a formal hearing or else cause reversable [sic] error as the Louisiana Supreme Court held:

> " . . . R.S. 15:529.1(D) specifically provides the *defendant be advised by the court* to a 'formal hearing' and to have the State prove its case."

In *State v. Griffin*, App 1 Cir. 1988, 525 So. 2d 705, the Court of Appeals held that it would be a reversable [sic] error to not inform the defendant of *"his right to be tried as to the truth of the allegations."* Also see *State v. Easton*, App. 2 Cir. 1985, 463 So. 2d 783.

3. The Trial Court failed to inform Petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true. Failure of Trial Judge to inform Petitioner of this requirement is reversable [sic] error as *State v. Easton*, App. 2 Cir. 1985, 463 So. 2d 783, held that:

> "Failure of trial court in prosecution for purse snatching and second-degree battery to inform defendant of nature of allegations in habitual offender bill of information or of his right to be tried as to the truth thereof, and *failure to require defendant to say whether the allegations were true.* . . . constitued [sic] error patent on the record, *requiring that sentence be vacated and cause remanded for further sentencing proceedings."*

At no time did the Trial Judge ask Petitioner if the allegations within the Multiple Offender Bill were true – the Judge obly [sic] asked for him to enter a plea to the Bill of Information, inwhich [sic] Defense Counsel entered a not guilty plea.

4. The Trial Judge erred by allowing Defense Counsel, Mr. Patrick Phillips, to enter the not guilty plea, rather than requiring Petitioner to enter the plea to the Multiple Offender proceedings, because Section "D" of

R.S. 15:529.1 provides that the court " . . . *shall require the offender to say whether the allegations are true.*". *State v. Easton*, App. 2 Cir. 1985, 463 So. 2d 783. Further, La. C. Cr. P. Article 553 requires that felony charged defendants "shall plead in person". Article 554 provides that "A defendant shall plea when arraigned". No where in the Code does it provide for a lawyer to enter a plea in multiple offender proceedings on behalf of the defendant. At no time did this Petitioner enter the plea, or waive his right to make the plea, or approve of the not guilty plea, or instruct Defense Counsel to enter such a plea.

5. The Trial Court failed to advise Petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions. During the course of the Armed Robbery trial, Petitioner took the witnesses stand and testified that he committed a crime, but it was Simple Robbery – not Armed Robbery. Before, during, and while on the stand before the jury, the prosecutor, Defense Counsel, and Trial Judge *KNEW* that if he was convicted by jury for Simple or Armed Robbery that the prosecutor was going to Multibill Petitioner. During Petitioner's testimony it was extracted from Petitioner that he had been felony convicted in Mississippi and the Trial Judge used this admission of prior guilt, during the Multiple Offender Trial, to adjudicate guilt as to the Multiple Offender Bill of Information by holding at Tr. 25:

> "THE COURT: Of course the Court can take judicial notice of what goes on in its own courtroom. *Mr. Trest at the trial of this case which I presided over took the stand and testified and freely admitted to having committed these offenses. The additional evidence that we have into the record is*

really a corroboration of the fact that he has admitted from this stand. So I find that he is a multiple offender."

The Trial Judge erred by not advising Petitioner before taking the witness stand of his right to "remain silent" and not to incriminate himself as to prior felony convictions during the robbery trial or the danger of it being used to enhance a multibill charge that he (the Trial Judge) *KNEW* was forthcoimg [sic] against Petitioner. The Trial Judge had a duty to inform Petitioner of the danger of taking the stand in his own behalf and the consequences of the prior felony convictions being extracted from him and then used against him during the Multiple Offender proceedings. The Trial Judge further erred during the Multiple Offender trial by not advising Petitioner of the right to object to the introduction of his illegal confession of prior felony convictions and of his right to "remain silent" during the enhancement proceedings.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969), the United States Supreme Court articulated the process that was due every defendant who elects to convict himself by a guilty plea in order to insure the unfettered and unencumbered voluntariness of a forfeiture of basic constitutional protections. The Louisiana Supreme Court accepted the *Boykin* procedural safeguards in *State Ex Rel Jackson v. Henderson*, 255 So. 2d 85 (1971). A formidable plethora of jurisprudence has followed in which the Louisiana Supreme Court has steadfastly applied the *Boykin* Rule with adherence even stronger than that advocated in *Boykin*.

In order to competently comply with the *Boykin* Rule, the trial court must advise the defendant of his constitutional right to trial, to confront his accusers, *and against self-incrimination*. In Louisiana the RECORD must affirmatively reflect the trial court's advise [sic] of this trial of rights, and then that the defendant knowingly and intelligently, and voluntarily waived same in order to convict himself.

The prospective application of the *Boykin* Rule applies to *ANY* formal judicial hearing in which one or all the basic Constitutional Rights enunciated in *Boykin* and *State Ex Rel Jackson v. Henderson*, are forfeited by a defendant. R.S. 15:529.1 provides for such a "formal hearing". A multibill offender proceedings in which a defendant relieves the prosecution of its burden of proof by admitting to being the one and same person previously convicted cannot be an exception. *State v. Martin*, 427 So. 2d 1182 (La. 1982); *State v. Johnson*, 432 So. 2d 815 (La. (1983).

But *Martin* and *Johnson* articulated no new rule of law, they simply reinterated [sic] the jurisprudential fountainhead decisions of *Boykin* and *State Ex Rel Jackson v. Henderson* in situations where Louisiana Courts seemingly became remiss in the strick [sic] and accurate compliance therewith.

The Louisiana Supreme Court in *State v. Johnson*, 432 So. 2d 815 (La. 1983), reviewed R.S. 15:529.1(D) and then reversed conviction and sentence by stating:

> "This Section of the statute clearly recognizes that the defendant, if he chooses, has the right to remain silent. Once the defendant chooses to remain silent the state must then by competent

> evidence prove the element of R.S. 15:529.1 before the defendant can be sentenced as an habitual offender. *Before the defendant chooses to acknowledge or confess in open court that he has been previously convicted of a felony, the statute requires that he first be cautioned as to his rights.* R.S. 15:529.1(D) specifically provides the defendant be advised by the court of his right to a 'formal hearing' and to have the state prove its case. *State v. Martin*, 427 So. 2d 1182 (La. 1982). *Further, this Section implictly [sic] provides that the defendant should be advised, by the court, of his statutory right to remain silent."*

It is quite clear, from the foregoing, that the Trial Court adjudicated Petitioner to be a Multiple Offender, not on proof that he was the one and same person previously convicted, *but on his own guilty plea* that was illegally extracted from him during the Robbery Trial and then used against him during the Multiple Offender Trial. There was no waiver by Petitioner of his right to remain silent and against self-incrimination, nor did Petitioner know of such a right, nor did the Trial Judge or anyone else advise Petitioner that he did not have to forfeit his privilege against self-incrimination and that he could remain silent.

An error patent on the face of the record, discoverable by a mere inspection of the pleadings and proceedings, that Petitioner pleaded guilty to being the one and same person, without a valid waiver of his Constitutional Rights against self-incrimination, is a reversable [sic] error and can be heard at any time by the Trial Court and corrected according to law.

Only one conclusion is tendable [sic]: Petitioner *INVOLUNTRARILY* [sic] and *UNKNOWINGLY* forfeited his right against self-incrimination. R.S. 15:529.1 specifically provides for a "formal hearing", and within this forum, the Constitution protects all defendants from an involuntrary [sic] and unknowing waiver of the rights against self-incrimination.

6. There was insufficient evidence produced during Multiple Offender trial to show whether or not the prior felony conviction ended in a *pardon*.

During the course of the Multiple Offender Hearing the State failed to present prima facie evidence showing that Petitioner did not receive a full pardon or the prior felony convictions by the Governor of the State of Mississippi. In *State v. Adams*, 355 So. 2d 917 (La. 1978), the Louisiana Supreme Court held that a full pardon by the Governor precludes use of a pardoned offense to enhance punishment. In *State v. Bennett*, App. 3 Cir. 1988, 524 So. 2d 1297, it reversed a Multiple Offender conviction and sentence by opinionating:

> "Besides the issue of good time, however, *we must also consider the possibility that defendant's sentence was commuted or that he was pardoned."*

R.S. 15:271: Plea of Not Guilty; *Burden of Proof*, states:

> "The plea of not guilty throws upon the State the burden of proving *beyond a reasonable doubt each element of the crime necessary to constitute the defendant's guilt."*

At no time during the Multiple Offender trial was the issue of pardon ever raised. Did the Petitioner receive a full pardon from the Governor in Mississippi on the prior

felony convictions? This is the missing element that must be proved at the Multiple Offender hearing and the reason for such a hearing. The State must prove in Multiple Offender proceedings that a full pardon by the Governor did not take place before, during, or after the prior convictions. The burden of proof is upon the State to prove the allegations within the Bill of Information. *State v. Curtis*, 338 So. 2d 662 (La. 1976); *State v. Lee*, 364 S.2d 1024 (La. 1978).

7. The Evidence introduced by the State as to prior felony convictions was illegally entered. At Tr. 8-9 the prosecutor introduced Exhibit #1 and #2, which are Mississippi felony convictions. There was a "Cover Letter" to the documents certifying them as being the Court Records of Petitioner's prior felony convictions. However, the Trial Judge agreed with Defense Counsel's objections and disallowed the "Cover Letter" and then over Defense Counsel's objections allowed introduction of non-certified Mississippi documents and committed reverseable [sic] error because:

A. The non-certified documents contains a "card" with the name of Richard Frank Trest and a picture from the alleged Mississippi Court without producing anyone from the Mississippi Clerk's Office, where records were purportedlly [sic] kept, to testify as to custody of the records, and that said copies did not contain certificate indicating that it was a copy of the original record purportedlly [sic] kept in Clerk's Office. The prosecutor may not gain a conviction upon uncertified material and said conviction is reversable [sic] under the teachings of *State v. Melton*, App. 2 1984, 456 So. 2d 192, as it provides:

> "Testimony of officer and certificate of court reporter was insufficient foundation to justify admission of uncertified copy of criminal transcript of defendant's prior guilty pleas for sentencing purposes, since it was never established that officer had custody of subject transcript, since no one from Clerk's Office, where records were purportedlly [sic] kept, testified as to custody of record, and since copy did not contain certificate indicating that it was copy of the original record, purportedlly [sic] kept in Clerk's Office."

B. That, assuming, the Mississippi documents were in fact proper, the Trial Judge in this Multiple Offender proceedings could not use same for enhancement purposes in Louisiana because the Louisiana Supreme Court held in *State v. Robicheaux*, 412 So. 2d 1313 (La. 1982), that:

> "The record must reflect that a prior felony conviction by guilty plea, or otherwise, that *the defendant was advised by judge of his right to appeal his conviction and sentence*. Article 1, Section 19, La. Const. 1974."

No where in the Mississippi trial records (Exhibit #1 and #2) can it be found that the judge advised Petitioner of his right to appeal his guilty plea – not a plea bargain – conviction and sentence. Therefore, such a conviction cannot be used in Louisiana for enhancement purposes because Petitioner was unaware of his right to appeal his illegal Mississippi convictions and sentences. The Mississippi records into Multiple Offender evidence does not inform Petitioner of his right to appeal or as to his right to counsel for said appeal as guaranteed by the Sixth Amendment and *Douglas v. California*, 372 U.S. 353, 357,

83 S. Ct. 814, 816, 9 L. Ed. 2d 811, 814 (1963); *State v. Graves*, 246 La. 460, 467, 165 So. 2d 285 (La. 1964). If Petitioner's Mississippi felony convictions are infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court, then Louisiana Constitution Article 1, Section 19, disallows enhancement punishment from those unconstitutional convictions in Mississippi.

8. The Trial Court erred by ordering said Second Offender sentence to be without *parole*, probation, or suspension of sentence for thirty-five years because LSA-R.S. 15:574(A)(1) states in pertinent part:

> *". . . . upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."*

Further, LSA-R.S. 15:529.1(A)(1), the Multiple Offender Statute, does not prohibit parole for Second Offenders. Petitioner was found guilty of being a Second Offender (Tr.25) before this Court under the Multiple Offender Act. However, LSA-R.S. 14:64 – Armed Robbery – Petitioner's original sentence, *prohibits parole*, and confused the Trial Judge.

Accordingly, Petitioner should be resentenced in conformity to law *with benefit of parole* eligibility.

9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-R.S. C. Cr. P. Article 894.1. The Trial Judge was required to *"state for the record the considerations taken into account and the factual basis therefor in imposing sentence"* as required by Art 894.1(C). In spite of the fact that this was a Multiple Offender Proceedings

and the Court sentenced Petitioner to less than the maximum term allowed by law, it still requires the sentencing judge to articulate his reason for the sentence and to consider any and all mitgating [sic] factors. These requirements are an essential aid to the appellate courts when reviewing a sentence for excessiveness and abuse of discretion. *State v. Spencer*, 374 So. 2d 1195 (La. 1975). Article 894.1 sets forth three factors which justify a sentence of incarceration and eleven factors which, although not excusing the defendant's conduct, tend to lessen his culpability. The Trial Judge is required to state for the record both the considerations he had taken into account and the factual basis for the imposition of sentence, particularizing the sentence. *State v. Jackson*, 360 So. 2d 842 (La. 1978). In all Multiple Offender proceedings these requirements must be followed or require reversal. *State v. Spears*, App. 1 Cir. 1984, 459 So. 2d 1328, writ denied 463 So. 2d 600; *State v. Sheppard*, App. 1 Cir. 1985, 472 So. 2d 267; *State v. Hudson*, App. 3 Cir. 1985, 463 So. 2d 93; *State v. Kenner*, 384 So. 2d 413 (La. 1980); *State v. Walker*, 416 So. 2d 534 (La. 1982).

In the instant Multiple Offender proceedings, Judge Lowe failed to make mention of Article 894.1 whatsoever or for his reasons for imposing a thirty-five year term and simply did not follow the law as required by the Code.

Even without formal contemporaneous objection, where the trial court imposed a sentence, without adequate compliance with mandatory statutory requirements and basis for sentence does not appear in the record, the sentence must be set aside. *State v. Dokes*, 398 So. 2d 1025 (La. 1981).

Accordingly, this Court should annual [sic] and set aside the Multiple Offender sentence and order Petitioner remanded to the jurisdiction of the 26th Judicial District Court for resentencing according to law and authority of the State of Louisiana.

INASMUCH as the proof in this case was a Multiple Offender, was not only invalid, but *INSUFFICIENT,* and unconstitutional, the double jeopardy prescriptions of State and Federal Constitutions bar resentencing pursuant to R.S. 15:529.1. See State v. Johnson, 432 So. 2d headnote #4 815 (La. 1983), which provides:

> "Pursuant to principle of double jeopardy, defendant who habitual offender conviction was reversed because he had been compelled to give evidence against himself *could not be tried again* on question of prior felony question. U.S.C.A. Const. Amend 5: LSA-Const. Art. 1, Sec. 16; LSA-R.S. 15:529.1"

In *Bullard v. Estelle,* 665 F. 2d 1347, cert. granted 102 S. Ct. 2927, 457 U.S. 1116, 73 L. Ed. 2d 1328, vacated 103 S. Ct. 776, on remand, 708 F. 2d 1020 (5th Cir. 1984), it was held:

> "Double jeopardy clause would prohibit resentencing of a defendant under habitual offender statute if State failed to provide sufficient evidence of habitual offender status at first trial." Also see *French v. Estelle,* 692 F. 2d 1021, rehearing denied, 692 F. 2d 318 and 698 F. 2d 1216, cert. denied 103 S. Ct. 2108 (5th Cir. 1982).

WHEREFORE, Petitioner prsys [sic] that this Honorable Court will grant relief to him according to law upon the above cited errors.

Respectfully Submitted.

/s/ Richard Franklin Trest

Richard Franklin Trest
Petitioner Pro Se
91171 Camp C, Tiger 3-R-7
Louisiana State Penitentiary
Angola, Louisiana 70712

Prepared by:

Legal Aid Office
Camp C
Louisiana State Penitentiary
Angola, Louisiana 70712

STATE OF LOUISIANA — NUMBER: 56,595

VERSUS — 26TH JUDICIAL DISTRICT COURT

RICHARD FRANKLIN TREST — BOSSIER PARISH, LOUISIANA

(Filed March 26, 1990)

REASONS FOR DENIAL OF POST CONVICTION RELIEF

Defendant, Richard Franklin Trest, filed this application for Post Conviction Relief. Defendant alleges that the sentence imposed by this court in the above numbered and captioned matter is illegal in that the Multiple Offender proceedings were contrary to the provisions of R.S. 15:529.1, that the trial court erred by imposing sentence to be served without benefit of parole, and that the trial court failed to indicate the factors for imposing such sentence as required by C.Cr.P. Article 894.1. Defendant's individual claims with regard to the Multiple Offender Bill of Information proceedings are enumerated in Paragraph 3 of his application for Post Conviction Relief.

Defendant raises no substantive issues regarding the Multiple Offender proceedings. His attack on the technical aspect of the proceedings lack merit. The record clearly proves that Defendant is the same person who was convicted in Sunflower County, Mississippi of five counts of "Burglary and Larceny", which would be a felony if charged under the laws of Louisiana. Defendant was not required to testify during the Multiple Offender

proceedings. Although Defendant testified at trial that he did in fact commit those crimes for which he was charged and, subsequently, convicted in the State of Mississippi, the proof submitted by the State at the Multiple Offender proceedings was sufficient beyond a reasonable doubt to prove that Defendant was indeed the same person without the court's consideration of Defendant's incriminating statements during trial.

Further, Defendant alleges that his sentence is illegal because the court directed that the sentence be served without benefit of parole. R.S. 14:64, the statute under which Defendant was charged in this case, was amended by Acts 1966, Ex.Sess.No.5,Sec.1. That amendment provided that whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years at hard labor, without benefit of *parole*, probation or suspension of sentence. Therefore, Defendant was legally sentenced to serve thirty-five (35) years at hard labor, without benefit of parole, probation, or suspension of sentence.

Finally, the transcript of the Multiple Offender proceedings which is filed in the record indicates that the trial judge stated his reasons for sentencing Defendant to only two years more than the minimum sentence for which Defendant was eligible as a second offender.

For the foregoing reasons, the application for Post Conviction Relief is hereby denied.

Thus done and signed this 26th day of March, 1990 at Benton, Louisiana.

/s/ Harmon Drew, Jr.
HARMON DREW, JR.
DISTRICT JUDGE

The Supreme Court of the State of Louisiana

STATE EX REL RICHARD FRANKLIN TREST — NO. 90-KH- 1609

VS.

LARRY SMITH, WARDEN LOUISIANA STATE PENITENTIARY — (Filed May 20, 1991)

IN RE: Trest, Richard Franklin; – Plaintiff(s); Applying for Writ of Supervisory and/or Review; Parish of Bossier 26th Judicial District Court Div. "D" Number 56,595

May 17, 1991

Denied.

Supreme Court of Louisiana
May 17, 1991

/s/ Illegible
Deputy Clerk of Court
For the Court

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(Filed Sep. 30, 1991)

UNITED STATES DISTRICT COURT

District

Name
RICHARD FRANKLIN TREST

Prisoner No.
D.O.C. #91171

Docket No.

Place of Confinement
Camp C-Bear, # ___, Louisiana State Penitentiary, Angola, Louisiana 70712

Name of Petitioner (include name upon which convicted)
Richard Franklin Trest

Name of Respondent (authorized person having custody of petitioner)
V. John P. Whitley, Warden sub. Nom. Larry Smith

The Attorney General of the State of:

PETITION

1. Name and location of court which entered the judgment of conviction under attack 26th Judicial District Court, Bossier Parish, Benton, Louisiana

2. Date of judgment of conviction June 8, 1979

3. Length of sentence Thirty-five (35) years without benefit of parole, probation, or suspension of sentence.

4. Nature of offense involved (all counts) Multiple Offender (R.S. 15:529.1) Second Offender (Armed Robbery)

5. What was your plea? (Check one)

   (a) Not guilty [XX]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   N/A No Answer or Not Appropriate

6. Kind of trial: (Check one)

   (a) Jury [XX] at Armed Robbery trial, Judge at HFC trial.
   (b) Judge only [ ]

7. Did you testify at the trial?

   Yes [X] No [ ]
   Petitioner testified at the Armed Robbery trial, but did not testify at HFC trial.

8. Did you appeal from the judgment of conviction?

   Yes [ ] No [ ]
   Petitioner does not know if an appeal was perfected

9. If you did appeal, answer the following:

   (a) Name of court N/A
   (b) Result N/A
   (c) Date of result N/A
   (d) Grounds raised N/A

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes [XX] No [ ]

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court 26th Judicial District Court, Benton, Louisiana

    (2) Nature of proceeding Post Conviction/ Writ of Habeas Corpus

    (3) Grounds raised The Entire Multiple Offender Proceedings Were In Violation of LSA-R.S. 15:529.1

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [X]

    (5) Result Denied

    (6) Date of result

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court Louisiana Supreme Court

    (2) Nature of proceeding Post Conviction/ Writ of Habeas Corpus

    (3) Grounds raised Same as in the 26th Judicial District Court

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [XX]

    (5) Result Denied

    (6) Date of result

    (c) As to any third petition, application or motion, give the same information:

    (1) Name of court Petitioner applies to this Court for Relief:

    (2) Nature of proceeding Post Conviction/ Writ of Habeas Corpus

    (3) Grounds raised Petitioner maintains the same posture as he did in State Court(s):

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [ ]

    (5) Result

    (6) Date of result

    (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

    (1) First petition, etc. Yes [ ] No [ ]

    (2) Second petition, etc. Yes [ ] No [ ]

    (3) Third petition, etc. Yes [ ] No [ ]

    (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain

briefly why you did not: The Multiple Offender proceedings was protested during trial. It is not known if any appeal was taken on the issue.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: *In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.*

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of Due Process of the Law in Violation of the Fourteenth Amendment of the United States Constitution in that the Entire Multiple Offender Proceedings was Unconstitutional:

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached Memorandum of Law for facts, claim, and legal argument.

B. Ground two: None

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: None

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: None

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: None

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes [ ] No [XX]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Patrick Phillips, Indigent Defenders Program, Benton, Louisiana

(b) At arraignment and plea Same

(c) At trial Same

(d) At sentencing Same

(e) On appeal Unknown

(f) In any post-conviction proceeding None

(g) On appeal from any adverse ruling in a post-conviction proceeding None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [ ] No [X]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [X] No [ ]

(a) If so, give name and location of court which imposed sentence to be served in the future: 20th Judicial District Court, St. Francisville, Louisiana

(b) Give date and length of the above sentence: (-4-86 -Attempted Simple Escape One (1) Year:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [X]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

8/13/91
(date)

/s/ Richard F. Trest
Signature of Petitioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

MEMORANDUM OF LAW SUPPORTING

APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Sept. 30, 1991)

MAY IT PLEASE THE COURT:

NOW COMES RICHARD FRANKLIN TREST, petitioner herein, moving the Court via an application for Writ of Habeas Corpus for RELIEF for the following reasons to-wit:

Petitioner filed for Post Conviction Relief in the 26th Judicial District Court and the Court denied relief on March 26, 1990.

Petitioner filed into the Louisiana Supreme Court for Post Conviction Relief and that Court denied relief on May 17, 1991, without a written opinion.

Wherefore petitioner has properly exhausted State Remedies and properly comes into Federal Court seeking relief.

Petitioner submits that the 26th Judicial District Court and the Louisiana Supreme Court did not follow precedented cases in denying relief.

STATEMENT OF THE CASE

Petitioner, RICHARD FRANKLIN TREST, was charged by Bill of Information for Armed Robbery, a

violation of LSA-R.S. 14:64. After a trial by 12 man jury with Court-Appointed Counsel, Mr. Patrick Phillips, petitioner was convicted as charged on March 29, 1979. The State then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging petitioner as a Second Offender. See Exhibit "A" attached hereto. Petitioner was subsequently convicted and sentenced to an enhancement term of thirty-five (35) years without benefit of *parole*, probation, or suspension of sentence by the Honorable Cecil C. Lowe, Judge, on June 8, 1979. See Exhibit "B" attached hereto.[1]

Petitioner now attacks the entire Multiple Offender proceedings as being contrary to R.S. 15:529.1 in this litigation.

STATEMENT OF THE CLAIMS

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by the prosecutor.
2. The Trial Court failed the inform petitioner of the right to be tried as to he [sic] truth of the Multiple Offender Bill of Information and as to a "formal hearing".
3. The Trial Court failed to inform petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true.
4. The Trial Court erred by allowing defense counsel to enter the not guilty plea to said charge.

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[1] See Multiple Offender Transcript attached hereto and referred as "tr. ___ from this point onward.

5. The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony conviction.
6. There was insufficient evidence during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.
7. The evidence introduced by the State as to prior felony convictions was illegally entered into evidence.
8. The Trial Court erred by ordering said Second Offender sentence to be without parole.
9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-C.Cr.P. Article 894.1.

ARGUMENT

Because the Multiple Offender issues involved in this petition are interrelated they will not be bifurcated herein and will be argued collectively.

The Multiple Offender Statute, LSA-R.S. 15:529.1(D), states in pertinent part:

> ". . . Whereupon the court in which the subsequent conviction was had *shall* cause the person, whether confined in prison or otherwise, to be brought before it and *shall* inform him of the allegations contained in the information and of his right to be tried to the truth thereof according to law and *shall* require the offender to say whether the allegations are true."

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by

the prosecutor. At Tr. 5-6 the prosecutor, Mr. Alexander L. Blondeau, Jr., testified that he had threaten to Multibill Petitioner if he did not plead guilty to the Armed Robbery charge and stated at tr. 6:

> "A. If he was convicted and went to trial, I said I would file a Multiple Offender Bill and I have honored my promise to you."

The only issue raised by the Defense before the jury was whether petitioner committed Armed Robbery or Simple Robbery. There was no doubt of guilt in the case – just the grade of guilt and the grade of crime was the core Petitioner was willing to plead guilty to Simple Robbery, but the prosecutor refused to accept the plea and wanted a guilty plea to Armed Robbery with no plea bargain.

Petitioner relied on *Hayes v. Cowan*, 547 F.2d 42 (5th Cir. 1976), which provides in pertinent part:

> "Prosecutor may not charge habitual offender act against prisoner for refusing to plead guilty to lesser offense and demanding trial."

Accordingly, the Trial Court erred in not quashing the Multiple Offender Bill of Information as being vindictive.

2. The Trial Court failed to inform Petitioner of the right to be tried as to the truth of the Multiple Offender allegations. In *State v. Johnson*, 432 So.2d 815 (La. 1983), the multiple offender record must show that the offender was told by the Trial Judge of the right to a formal hearing or else cause reversable [sic] error as the Louisiana Supreme Court held:

> ". . . R.S. 15:529.1(D) specifically provides the *defendant be advised by the court* to a

> 'formal hearing' and to have the State prove its case."

In *State v. Griffin*, App. 1 Cir. 1988, 525 So.2d 705, the Court of Appeals held that it would be a reversable [sic] error to not inform the defendant of *"his right to be tried as to the truth of the allegations."* Also see *State v. Easton*, App. 2 Cir. 1985, 463 So.2d 783.

3. The trial Court failed to inform petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true. Failure of Trial Judge to inform petitioner of this requirement is reversable [sic] error as *State v. Easton*, App. 2 Cir. 1985, 463 So.2d 783, held that:

> "Failure of trial court in prosecution for a purse snatching and second-degree battery to inform defendant of nature of allegations in habitual offender bill of information or of his right to be tried as to the truth thereof, and *failure to require defendant to say whether the allegations were true-* . . . constituted error patent on the record, *requiring that sentence be vacated and cause remanded for further sentencing proceedings."*

At no time did the Trial Judge ask petitioner if the allegations within the Multiple Offender Bill were true – The Judge obly [sic] asked for him to enter a plea to the Bill of Information, in which Defense Counsel entered a not guilty plea.

4. The Trial Judge erred by allowing Defense Counsel, Mr. Patrick Phillips, to enter the not guilty plea, rather than requiring petitioner to enter the plea to the Multiple Offender proceedings, because Section "D" of R.S. 15:529.1 provides that the court " . . . *shall require the offender to say whether the allegations are true." State v. Easton*, App. 2 Cir. 1985, 463 So.2d 783.

Further, La.C.Cr.P Article 553 requires that felony charged defendants "shall plead in person". Article 554 profides [sic] that "A defendant shall plea when arraigned". No where in the Code does it provide for a lawyer to enter a plea in multiple offender proceedings on behalf of the defendant. At no time did this petitioner enter the plea, or waive his right to make the plea, or approve of the not guilty plea, or instruct Defense Counsel to enter such a plea.

5. The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions. During the course of the Armed Robbery trial, petitioner took the witnesses stand and testified that he committed a crime, but it was Simple Robbery – not Armed Robbery. Before, during, and while on the stand before the jury, the prosecutor, Defense Counsel, and Trial Judge *KNEW* that if he was convicted by jury for Simple or Armed Robbery that the prosecutor was going to Multibll [sic] petitioner. During petitioner's testimony it was extracted from petitioner that he had been felony convicted in Mississippi and the Trial Judge used this admission of prior guilt, during the Multiple Offender Trial, to adjudicate guilt as to the Multiple Offender Bill of Information by holding at Tr. 25:

> "THE COURT: Of course the Court can take judicial notice of what goes on in its own courtroom. *Mr. Trest at the trial of this case which I presided over took the stand stand [sic] and testified and freely admitted. to having committed the offenses. The additional evidence that we have into the record is really a corroboration of the fact that he has admitted from this stand. So I find that he is a multiple offender.*"

The Trial Judge erred by not advising petitioner before taking the witness stand of his right to "remain silent" and not to incriminate himself as to prior felony convictions during the robbery trial or the danger of it being used to enhance a multibill charge that he (the Trial Judge) *KNEW* was forthcoming against petitioner. See *State v. Gibson*, 572 So.2d 666 (La.App. 5 Cir. 1990). Gibson was not advised of his right to remain silent when he took witness stand. (Multiple Offender Hearing). The Trial Judge had a duty to inform petitioner of the danger of taking the stand in his own behalf and the consequences of the prior felony convictions being extracted from him and then used against him during the Multiple Offender proceedings. The Trial Judge further erred during the Multiple Offender trial by not advising petitioner of the right to object to the introduction of his illegal confession of prior felony convictions and of his right to "remain silent" during the enhancement proceedings.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), the United States Supreme Court articulated the process that was due every defendant who elects to convict himself by a guilty plea in order to insure the unfettered and unencumbered voluntariness of a forfeiture of basic constitutional protections. The Louisiana Supreme Court accepted the *Boykin* procedural safeguards in *State Ex Rel Jacksone* [sic] *v. Henderson*, 255 So.2d 85 (1971). A formidable plethora of jurisprudence has followed in which the Louisiana Supreme Court has steadfastly applied the *Boykin* Rule with adherence even stronger than that. advocated in *Boykin*.

In order to competently comply with the *Boykin* Rule, the trial court must advise the defendant of his constitutional right to trial, to confront his accusers, *and against self-incrimination*. In Louisiana the RECORD must affirmatively reflect the trial court's

advise [sic] of this tial [sic] of rights, and then that the defendant knowingly and intelligently, and voluntarily waived same in order to convict himself.

The prospective application of the *Boykin* Rule applies to *ANY* formal judicial hearing in which one or all the basic Constitutional Rights enunciated in *Boykin* and *State Ex Rel Jackson v. Henderson*, are forfeited by a defendant. R.S. 15:529.1 provides for such a "formal hearing". A multibill offender proceedings in which a defendant relieves the prosecution of its burden of proof by admitting to being the one and same person previously convicted cannot be an exception. *State v. Martin*, 427 So.2d 1182 (La. 1982); *State v. Johnson*, 432 So.2d 815 (La. 1983).

But *Martin* and *Johnson* articulated ho [sic] new rule of law, they simply reinterated [sic] the jurisprudential fountainhead decisions of *Boykin* and *State Ex Rel Jackson v. Henderson* in situations where Louisiana Courts seemingly became remiss in the strick [sic] and accurate compliance therewith.

The Louisiana Supreme Court in *State v. Johnson*, 432 So.2d 815 (La. 1983), reviewed R.S. 15:529.1(D) and then reversed conviction and sentence by stating:

> "This Section of the statute clearly recognizes that the defendant, if he chooses, has the right to remain silent. One the defendant chooses to remain silent the state must then by competent evidence prove the element or R.S. 15:529.1 before the defendant can be sentenced as an habitual offender. *Before the defendant choose to acknowledge or confess in open court that he has been previously convicted of a felony, the statute requires that he first be cautioned as to his rights.* R.S. 15:529.1(D) specifically provides the defendant be advised by the court of his right to a 'formal hearing' and to have the state prove its case. *State v. Martin*, 427 So.2d 1182 (La. 1982). *Further, the Section implictly* [sic] *provides that the defendant should be advised, by the court, of his statutory rihgt* [sic] *to remain silent."*

It is quite clear, from the foregoing, that the Trial Court adjudicated petitioner to be a Multiple Offender, not on proof that he was the one and same person previously convicted, *but on his own guilty plea* that was illegally extracted from him during the Robbery Trial and then used against him during the Multiple Offender Trial. There was no waiver by petitioner of his right to remain silent andagaisnt [sic] self-incrimination, nor did petitoner [sic] know of such a right, nor did the Trial Judge or anyone else advise petitioner that he did not have to forfeit his privilege against self-incrimination and that he could remain silent.

An error patent on the face of the record, discoverable by a mere inspection of the pleading and proceddings [sic], that petitioner pleaded guilty to being the one and same person, without a valid waiver of his Constitutional Rights against self-incrimination, is a reversable [sic] error and can be heard at any time by the Trial Court and corrected according to law.

Only one conclusion is tendable [sic]: Petitioner *INVOLUNTRARTILY* [sic] and *UNKNOWINGLY* forfeited his right against self-incrimination. R.S. 15:529.1 specifically provides for a "formal hearing", and within this forum, the Constitution protects all defendants from an involuntrary [sic] and unknowing waiver of the rights against self-incrimination.

6. There wa [sic] insufficient evidence produced during Multiple Offender trial to show whether or not the prior felony conviction ended in a *pardon*.

During the course of the Multiple Offender Hearing the State failed to present prima facie facie [sic] evidence showing that petitioner did not receive a full pardon on the prior felony convictions by the Governor of the State of Mississippi. In *State v. Adams*, 355 So.2d 917 (La. 1978), the Louisiana Supreme Court held that a full pardon by the Governor precludes use of a pardoned offense to enhance punishment. In *State v. Bennett*, App. 3 Cir. 1988, 524 So.2d 1297, it reversed a Multiple Offender conviction and sentence by opinionating:

> "Besides the issue of good time, however, *we must also consider the possibility that defendant's sentence was commuted or that he was pardoned.*"

R.S. 15:271: Plea of Not Guilty; *Burden of Proof*, states:

> "The plea of not guilty throws upon the State the burden of proving *beyond a reasonable doubt each element of the crime necessary to constitute the defendant's guilt.*"

At not [sic] time during the Multiple Offender trial was the issue of pardon ever raised. Did the petitioner receive a full pardon from the Governor in Mississippi on the prior felony convictions? This is the missing element that must be proved at the Multiple Offender hearing and the reason for such a hearing. The State must prove in Multiple Offender proceedings that a full pardon by the Governor did not take place before, during, or after the prior convictions. The burden of proof is upon State to prove the allegations within the Bill of Information. *State v. Curtis*, 338 So.2d 662 (La. 1976); *State v. Lee*, 364 So.2d 1024 (La. 1978).

7. The Evidence introduced by the State as to prior felony convictions was illegally entered. At. Tr. 8-9 the prosecutor introduced Exhibit #1 and #2, which are Mississippi felony convictions. There was a "Cover Letter" to the documents certifying them as being the Court Records of Petitioner's prior felony convictions. However, the Trial Judge agreed with Defense Counsel's objections and disallowed the "Cover Letter" and then over Defense Counsel's objections allowed introduction of non-certified Mississippi documents and committed reverseble [sic] error because:

A. The non-certified documents contains a "card" with the name or [sic] Richard Frank Trest and a picture from the alleged Mississippi Court without producing anyone from the Mississippi Clerk's Clerk's Office, where records were purportedly kept, to testify as to custody of the records, and that said copies did not contain certificate indicating that it was a copy or the original record purpordedly [sic] kept in Clerk's Office. The prosecutor may not gain a conviction upon uncertified material and said conviction is reversible under the teachings of *State v. Melton*, App. 2 1984, 456 So.2d 192, as it provides:

> "Testimony of officer and certificate of court reporter was insufficient foundation to justify admission of uncertified copy of criminal transcript of defendant's prior guilty pleas for sentencing purposes, since it was never established that officer had custody of subject transcript, sine [sic] no one from Clerk's Office, where records were purportedly kept, testified as to custody of record, and since copy did not contain certificate indicating that it was copy of

the original record, purportedly kept in Cl[illegible]'s Office."

B. That, assuming, the Mississippi documents were in fact proper, the Trial Judge in this Multiple Offender proceedings could not use same for enhancement purposes in Louisiana because the Louisiana Supreme Court held in *State v. Robicheaux*, 412 So.2d 1313 (La. 1982), that:

> "The record must reflect that a prior felony conviction by guilty plea, or otherwise, that *the defendant was advised by judge of his right to appeal his conviction and sentence.* Article 1, Section 19, La. Const. 1974."

No where in the Mississippi trail [sic] records (Exhibit #1 and #2) can it be found that the judge advised petitioner of his right to appeal his guilty plea – not a plea bargain – conviction and sentence. Therefore, such a conviction cannot be used in Louisiana for enhancement purposes petitioner was unaware of his right to appeal his illegal Mississippi convictions and sentences. The Mississipi [sic] records into Multiple Offender evidence does not inform petitioner of his right to appeal or as to his right to counsel for said appeal as guaranteed by the Sixth Amendment and *Douglas v. California*, 372 U.S. 353, 357, 83 S.Ct. 814, 816, 9 L.Ed.2d 811, 814 (1963) *State v. Graves*, 246 La. 460, 467, 165 So.2d 285 (La. 1964). If petitioner's Mississippi felony convictions are infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court, then Louisiana Constitution Article 1, Section 19, disallows enhancement punishment from those unconstitutional convictions in Mississippi.

8. The Trial Court erred by ordering said Second Offender sentence to be without *parole*, probation, or

suspension of sentence for thirty-five years because LSA-R.S 15:574(A) (1) states in pertinent part:

> *"... upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."*

Further, LSA-R.S. 15:529.1(A) (1), the Multiple Offender Statute, does not prohibit parole for Second Offenders. Petitioner was found guilty of being a Scond [sic] Offender (Tr.25) before this Court under the Multiple Offender Act. However, LSA-R.S. 14:64 – Armed Robbery – petitioner's original sentence, *probibits* [sic] *parole*, and confused the Trial Judge.

Accordingly, petitioner should be resentenced in conformity to law *with benefit of parole* eligibility.

9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-R.S. C.Cr.P. Article 894.1. The Trial Judge was required to *"state for the record the considerations taken into account and the factual basis therefor in imposing sentence"* as required by Art 894.1(C). In spite of the fact that this was a Muliple [sic] Offender proceedings and the Court sentenced petitioner to less than the maximum term allowed by law, it still requires the sentencing judge to articulate his reason for the sentence and to consider any all mitgating [sic] factors. These requirements are an essential aid to the appellate courts when reviewing a sentence for excessiveness and abuse of discretion. *State v. Spencer*, 374 So.2d 1195 (La. 1975). Article 894.1 sets forth three factors which justify a sentence of incarceration and eleven factors which, although not excusing the defendant's conduct, tend to lessen his culpability. The Trial Judge is required to state for the record both the considerations he had taken into account and the factual basis for the imposition of

sentence, particularizing the sentence. *State v. Jackson*, 360 So.2d 842 (La. 1978). In all Multiple Offender proceedings these requirements must be followed or require reversal. *State v. Spears*, App. 1 Cir. 1984, 459 So.2d 1328, writ denied 463 S0.2d 600; *State v. Shippard*, App. 1 Cir. 1985, 472 So.2d 267 *State v. Hundson*, App. 3 Cir. 1985, 463 So.2d 93; *State v. Kenner*, 384 So.2d 413 (La. 1980); *State v. Walker*, 416 So.2d 534 (La. 1982).

In the instant Multiple Offender proceedings, Judge Lowe failed to make mention to Article 894.1 whatsoever or for his rasons [sic] for imposing a thirty-five year term and simply did not follow the law as required by the Code.

Even Without formal contemporaneous objection, where the trial court imposed a sentence, without adequate compliance with mandatory statutory requirements and basis for sentence does not appear in the record, the sentence must be set aside. *State v. Dokes*, 398 So.2d 1025 (La. 1981).

Accordingly, this Court should annual [sic] and set aside the Mulitple [sic] Offender sentence and order petitioner remanded to the jurisdiction of the 26th Judicial District Court for resentencing according to law and authority of the State of Louisiana.

INASMUCH as the proof in this case was a Multiple Offender, was not only invalid, but *INSUFFICIENT*, and unconstitutional, the double jeopardy prescriptions of State and Federal Constitutions bar resentencing pursuant to R.S. 15:529.1. *State v. Johnson*, 432 So.2d headnote #4 815 (La. 1983), which provides:

> "Pursuant to principle of double jeopardy, defendant who habitual offender conviction

> was reversed because he had been compelled to give evidence against himself *could not be tried again* on question of prior felony question. U.S.C.A. Const. Amend 5; LSA-Const. Art. 1, Sec. 16; LSA-R.S. 15:529.1"

In *Bullard v. Estelle*, 665 F.2d 1347, cert. granted 102 S.Ct. 2927, 457 U.S. 1116, 73 L.Ed.2d 1328, vacated 103 S.Ct. 776, on remand, 708 F.2d 1020 (5th Cir. 1984), it was held:

> "Double clause would prohibit resentencing of a defendant under habitual offender statute if State failed to provide sufficient evidence of habitual offender status at first trial." Also see *French v. Estelle*, 692 F.2d 1021, rehearing denied, 692 F.2d 318 and 698 F.2d 1216, cert. denied 103 S.Ct. 2108.

WHEREFORE, petitioner prays that this Honorable Court will grant relief to him according to law upon the above cited errors.

Rsepectfully [sic] submitted,

/s/ Richard F. Trest
Richard Franklin Trest
Petitioner Pro Se
D.O.C. #91171
Camp-C-Bear #1
Louisiana State Penitentiary
Angola, Louisiana 70712

(Attachments Omitted)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RICHARD FRANKLIN TREST	**CIVIL ACTION NO. 91-2131**
VERSUS	**JUDGE STAGG – SECTION P**
JOHN P. WHITLEY, WARDEN, LOUISIANA STATE PENITENTIARY, ET AL	**MAGISTRATE JUDGE PAYNE**
	(Filed Dec. 19, 1991)

MEMORANDUM ORDER

Before the Court is an application for a writ of *habeas corpus* filed in *forma pauperis* by *pro se* petitioner, **Richard Franklin Trest,** pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1979 conviction as a Multiple Offender (La.R.S. 15:529.1) and a Second Offender of armed robbery. He was sentenced to 35 years of incarceration without benefit of parole, probation or suspension of sentence by the Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana. He is presently confined in the Louisiana State Penitentiary, in Angola, Louisiana ("Angola"). Named as respondent is the warden at Angola, John P. Whitley.

Petitioner claims that he has exhausted state court remedies by application for post conviction relief/writ of habeas corpus in the Twenty-Sixth Judicial District Court, and to the Louisiana Supreme Court which both denied

him relief. Petitioner contends his incarceration is unconstitutional based on the single argument that he was denied due process in violation of the Fourteenth Amendment of the United States Constitution "in that the Entire Multiple Offender Proceedings was Unconstitutional". In order for this Court to determine what action, if any, shall be taken on this application;

THE CLERK IS DIRECTED to serve by mail, a copy of the application and this Order on the Attorney General for the State of Louisiana, the District Attorney for the judicial district where petitioner was convicted, and the respondent; and to serve petitioner with a copy of this Order only.

IT IS ORDERED that respondent, through the District Attorney, file within thirty (30) days after the date of service of summons:

1. An answer to the application.

(a) The answer shall state whether petitioner has exhausted state remedies, including any post-conviction remedies available to him under Louisiana law, by properly presenting to all lower courts and the Supreme Court of Louisiana *all* issues raised in this petition.

(b) In the event the State contends that it has been prejudiced in its ability to respond by petitioner's delay in filing or that the petition is a second or successive petition [Rule 9(a) and (b), Rules Governing Section 2254 Cases in United States District Court], the answer shall set forth such contentions with particularity.

2. A memorandum brief of law in support of all issues raised in the answer, citing relevant Fifth Circuit authority and *referring to the pertinent page numbers* in the state court record in support of the answer. **A COPY OF THE BRIEF FILED IN STATE COURT *WILL NOT* BE DEEMED SUFFICIENT IN THIS PROCEEDING.**

IT IS FURTHER ORDERED that petitioner is allowed twenty (20) days following the filing of respondent's memorandum in which to file any response he wishes to present to this Court.

IT IS FURTHER ORDERED that the District Attorney file with the Court within thirty (30) days after the date of service:

1. A certified copy of the state court record, including transcripts of all proceedings held in the state courts;

2. All documents, including all briefs or memoranda of any party, filed in connection with any appeal or application for post-conviction relief presented to any and all state, district or appellate courts; and

3. Copies of all state court dispositions, including the Louisiana Supreme Court decision pertaining to the conviction under attack.

The pages of the records shall be arranged in chronological sequence, securely bound together and numbered consecutively (handwritten numbers are acceptable).

An index describing each item of the records sent and showing each item's page number shall also be attached.

In the event the District Attorney is unable to produce any of the above documents, he shall advise this Court in writing why he is unable to produce them.

After the record is complete and all legal delays have run, the Court will determine the necessity of an evidentiary hearing. If no hearing is necessary, a Report and Recommendation will be made without further notice.

IT IS FURTHER ORDERED that, as a condition to their acceptance by the Clerk, all future filings by petitioner or respondents shall include a certificate indicating that a copy thereof has been furnished to the other parties.

THUS DONE AND SIGNED in chambers, in Shreveport, Louisiana, this the 18th day of December, 1991.

/s/ Roy S. Payne
~~ROBERT H. SHEMWELL~~
UNITED STATES
MAGISTRATE JUDGE

COPY SENT
DATE 12-19-91
BY cm
TO Trest
Warden
Atty Gen
Dist Atty

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Jan. 9, 1992)

NOW INTO COURT through the undersigned District Attorney comes and appears the State of Louisiana and in response to the petitioner's application for writ of habeas corpus, respectfully answers as follows:

1.

From a review of the record, it does appear to the State of Louisiana that petitioner does not have any State remedies at this time, and therefore the State admits that petitioner has exhausted all State remedies, including any post conviction relief available to him under Louisiana Law.

2.

The State shows that petitioner's incarceration is constitutional and that the State multiple offender proceedings against petitioner meets due process standards as required by the Fourteenth Amendment of the United States Constitution.

3.

The State therefore specifically denies defendant's complaint of denial of due process regarding the State multiple offender proceedings and the nine allegations of errors, listed on Page 3 of his memorandum in support of his application for writ of habeas corpus.

4.

The State attaches hereto a memorandum of law in opposition to this application for writ of habeas corpus, along with supporting documents as required in this Honorable Court's memorandum order of December 18, 1991.

WHEREFORE, the State of Louisiana prays that this answer, supporting memorandum and attachments be deemed good and sufficient and in compliance with the Court's memorandum order of December 18, 1991; further prays that after due consideration, this Honorable Court dismiss petitioner's application for writ of habeas corpus for a lack of merit.

Respectfully submitted,

/s/ James M. Bullers
JAMES M. BULLERS
DISTRICT ATTORNEY
P.O. BOX 69
BENTON, LA 71006

BAR NO. 3643

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Jan. 9, 1992)

MAY IT PLEASE THE COURT:

Richard Franklin Trest was charged in the 26th Judicial District Court for Bossier Parish, Louisiana with the offense of Armed Robbery. This prosecution was instituted by a Grand Jury Indictment dated January 5, 1979. The offense itself occurred on or about December 26, 1978. After extensive pretrial motions, the defendant was tried on the merits beginning on or about March 26, 1979, and was found guilty as charged by the trial jury on or about March 29, 1979.

On April 19, 1979, which was prior to sentencing, the prosecuting attorney filed an habitual offender bill of information, alleging that the defendant had been previously convicted of a felony in 1976 in the State of Mississippi. Defendant appeared in open court on the habitual information bill on April 24, 1979, and through counsel waived formal arraignment and entered a plea of not guilty. A hearing was held on the habitual offender bill on June 8, 1979, and defendant was found to be a multiple felony offender under the provisions of LRS 15:529.1. The defendant was then sentenced to 35 years at hard

labor without benefit of probation, parole or suspension of sentence as required by LRS 14:64.

1.

ARGUMENT AS TO DEFENDANT'S FIRST CLAIM

At the hearing on the habitual information bill held on June 8, 1979, the defense attorney called the prosecutor to the stand concerning plea discussions prior to the trial of the primary charge of armed robbery. The prosecutor testified that if the defendant plead [sic] guilty *as charged*, that he would not be prosecuted as a multiple offender, but that if he elected to go to trial and lost he would be prosecuted as a multiple offender. The defense argued to the trial court that this was unconstitutional tactics by the prosecutor, but the court rejected this argument. The State prosecutor in his argument cited *Warden Kurper vs. Hays*, 98 S.Ct. 663 (1970). (See Transcript of Multiple Offender Evidentiary Hearing beginning at Page 5 and continuing through the Court's ruling at the top of Page 8.)

Petitioner in the present proceedings cites *Hayes vs. Cowan*, 547 F.2d 42 (5th Cir. 1976). The State shows that *Hayes vs. Cowan* presented a different factual situation. There the prosecutor increased the charges to a more serious offense ostensively [sic] because of the defendant's refusal to plead guilty. In the instant case the defendant was prosecuted under the existing indictment and the prosecutor acted within constitutional due process standards in advising the defendant's counsel that defendant had the choice of pleading guilty as charged without facing the enhanced penalty provisions of LRS

15:529.1 or going to trial and risking the possibility of an enhanced penalty if he was found guilty.

Prosecutors should be and are given reasonable flexibility in the plea negotiation process. In this case the defendant was prosecuted under the existing indictment and the prosecutor clearly acted within constitutional limits in advising defense counsel of the defendant's choices. The prosecutor's actions did not violate defendant's Fourteenth Amendment Due Process rights and this claim is therefore without merit.

2.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 2, 3 & 4

Defendant's claims 2, 3 & 4 allege procedural errors by the court and the State believes that these claims can be combined for the purposes of argument. Constitutional due process under the Fourteenth Amendment recognizes that the issue of whether a defendant is an habitual criminal is essentially independent of the determination of guilt or innocence with respect to the underlying substantive offense. As long as the State provides the alleged habitual criminal with reasonable notice and an opportunity to be heard, Constitutional due process requirements have been satisfied. Louisiana has enacted LRS 15:529.1, which contains provisions under subsection D thereof for the procedure to be followed for habitual offender proceedings.

The Louisiana trial court complied with the applicable provisions of LRS 15:529.1 in that the defendant was given notice by the State filing a formal bill of information, alleging that the defendant was a multiple felony

offender, with the bill also setting out the details of his prior felony convictions. The defendant was thereafter called before the court to answer to this bill of information, at which time the defendant waived arraignment and through counsel entered a plea of not guilty to the habitual offender bill. Thereafter a hearing was held and evidence presented from which the court was able to determine that the defendant was in fact a second felony offender.

The procedure employed by the court in the instant case meets Fourteenth Amendment due process requirements and complies with the procedural requirements of the State of Louisiana.

The record clearly shows that the defendant was present at arraignment on the bill with his attorney, that through his attorney he entered a plea of not guilty, thus in fact denying the allegations. A hearing was subsequently held wherein defendant was again represented by his attorney and where the defendant had a full opportunity to be heard on all matters and to controvert the allegations as he and his counsel saw fit.

Furthermore, Louisiana Code of Criminal Procedure, Articles 551, 552 and 553, contemplate exactly the plea procedure that transpired in the instant case. The defendant plead [sic] in court in person and with the assistant [sic] of his counsel, entered a plea of not guilty. There is no requirement either in Louisiana Law or under due process requirements that the defendant himself has to utter his plea or denial.

The claims the petitioner set out in numbers 2, 3 and 4 are totally without merit for the reasons set forth above.

3.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 5

Defendant next complains that the trial court had a duty to advise him not to incriminate himself as to his prior felony convictions and failed to do so. Since defendant did not testify at the habitual offender hearing, he is obviously referring to his testimony given at the armed robbery trial. He further complains that the trial judge knew that a multiple offender charge was forthcoming against petitioner, even though this was impossible since it was strictly up to the District Attorney and not the trial judge to file a multiple offender bill.

The defendant also cites *State vs. Gibson*, 572 So.2d 666 (La.App. 5th Cir. 1990) as authority that the trial judge erred. *State vs. Gibson* dealt strictly with the defendant's testimony at his multiple offender hearing. In the instant case, defendant remained silent at his multiple offender hearing and was represented at all stages herein by a competent counsel.

The State also fails to see how the *Boykin* decision applies here since the defendant exercised his right to contest both the primary charge and the habitual offender bill with the assistance of counsel. Apparently at the armed robbery trial the defendant decided to take the stand to try and convince the jury that he was guilty of only the lessor [sic] charge of simple robbery. This certainly was trial strategy that the defendant, with the assistance of his counsel, decided upon in an effort to avoid being found guilty of armed robbery. The Fourteenth Amendment does not require that a State defendant be informed of habitual criminal charges prior to his

conviction on a primary charge. See *Wessling vs. Bennett*, 410 F.2d 205 (C.A. Iowa 1969), Cert. Denied 90 S.Ct. 384; *Stewart vs. Cunningham*, 550 A.2d 96.

At the defendant's trial on the primary charges of armed robbery, he was free to testify or not testify as he so chose. The trial court had no duty to, nor did the defendant have a constitutional right to, a warning prior to his trial testimony that the State of Louisiana may file an habitual offender bill in an effort to enhance the defendant's penalty if he were convicted. There is no merit to this claim of error.

4.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 6

Defendant next claims there was insufficient evidence to show whether or not his prior felony conviction ended in a pardon. The State presented sufficient evidence to establish his prior felony convictions and the State contends that if the defendant had been pardoned, the burden would have fallen on him too to make this assertion and to establish it to the satisfaction of the court. See *Foots vs. State of Louisiana*, 793 F.2d 610 (C.A. 5 1986). This claim of error also totally lacks merit.

5.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 7

Defendant alleges he was determined to be a multiple felony offender on a basis of improper evidence. The fundamental requisites of due process, when an habitual criminal statute is to be invoked, is reasonable notice and

an opportunity for a full and complete hearing, with the right to the aid of competent counsel. See *Johnson vs. State of Kansas*, 284 F.2d 344 (C.A. Kansas 1960). In the proceedings of Richard Franklin Trest, the State of Louisiana met these fundamental requisites of due process and the evidence presented at the contradictory multiple offender hearing was properly admitted by the judge and was substantially in compliance with LRS 15:529.1. This evidence included conviction records from the State of Mississippi with fingerprints. The State also presented an expert witness positively identifying the fingerprints in these conviction records to match that of the defendant. The court also considered the defendant's testimony at trial and concluded the defendant was one and the same person and was therefore a second felony offender. The procedure followed by the State of Louisiana in this case, including the evidence admitted and considered by the court, meets the due process requirements of the Fourteenth Amendment to the Constitution. There is absolutely no merit to this claim.

6.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 8 & 9

The defendant's last two claims can be combined for the purpose of argument. The Louisiana Code of Criminal Procedure, Article 894.1 sets out sentencing guidelines for the court in determining an appropriate sentence in a particular case. Article 14:64 of the Louisiana Criminal Code mandates the court to impose a sentence in armed robbery cases of not less than five (5) years nor more than 99 years, and, further, requires that the sentence be without benefit of parole, probation or suspension. Applying

these two articles, Louisiana law simply requires that the court impose a sentence between 5 and 99 years for the offense of armed robbery, and in determining the exact number of years, the trial judge should apply the provisions of Code of Criminal Procedure, Article 894.1. The record indicates a sufficient articulation by the trial court to comply with the sentence requirements of the State of Louisiana, and further that the sentence was within the range authorized by the armed robbery statute. Actually, after determining the defendant was a second felony offender, the court correctly concluded the penalty range to be from 33 years to 198 years, without benefit of parole or suspension of sentence.

The court properly followed the Louisiana law and procedure regarding the sentencing of the defendant and these claims are without merit.

CONCLUSION

The procedure followed by the State of Louisiana in this case meets constitutional due process standards as required by the Fourteenth Amendment. The defendant was represented at all times by competent counsel, sufficient notice was given by the State by filing the Habitual Offender Bill of Information and the defendant was given a full and complete hearing with the assistance of counsel. The procedure followed by the State of Louisiana also meets the requirements of LRS 15:529.1 and the sentence imposed by the court complies with the requirements of LRS 14:64 and the Louisiana Code of Criminal Procedure, Article 894.1. The petitioner in this case has therefore

shown no grounds which would entitled [sic] him to any relief herein.

Respectfully submitted,

/s/ James M. Bullers
JAMES M. BULLERS
DISTRICT ATTORNEY
P.O. BOX 69
BENTON, LA 71006

BAR NO. 3643

(Attachments Omitted)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

REPORT AND RECOMMENDATION

(Filed Feb. 2, 1994)

Currently before the court is an application for a writ of habeas corpus filed in forma pauperis by pro se petitioner, Richard Franklin Trest, pursuant to 28 U.S.C. §2254. This matter was referred to the undersigned for report and recommendation in accordance with the standing order of this court.

Petitioner challenges his 1979 conviction as a multiple offender (La.R.S. 15:529.1) and a second offender of armed robbery. He was sentenced to 35 years of incarceration without benefit of parole, probation or suspension of sentence by the 26th Judicial District Court, Bossier Parish, Louisiana. He is presently confined in the Louisiana State Penitentiary, at Angola, Louisiana ("Angola"). Named as respondent is the Warden at Angola, John P. Whitley.

Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief. The petitioner contends that his incarceration is unconstitutional based on the single argument that he was denied due process in violation of the Fourteenth Amendment of the United States Constitution "in that the

entire multiple offender proceedings was unconstitutional". More specifically, the plaintiff alleges nine separate errors which he contends violated his constitutional rights:

> "(1) The Trial Court erred by not quashing the multiple offender bill of information as being vindictive by the prosecutor.
>
> "(2) The Trial Court failed to inform petitioner of the right to be tried as to the truth of the multiple offender bill of information as to a "formal hearing".
>
> "(3) The Trial Court failed to inform petitioner of the requirement to say whether the allegations within the multiple offender charge were true.
>
> "(4) The Trial Court erred by allowing defense counsel to enter the not guilty plea to said charge.
>
> "(5) The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony conviction.
>
> "(6) There was insufficient evidence during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.
>
> "(7) The evidence introduced by the State as to prior felony convictions was illegally entered into the evidence.
>
> "(8) The Trial Court erred by ordering said Second Offender sentence to be without parole.
>
> "(9) The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by L.S.A.-C.Cr.P. Article 894.1."

Claim No. 1

At the hearing on the habitual offender bill of information, held on June 8, 1979, the defense attorney called the prosecutor to the stand concerning plea discussions prior to the trial of the primary charge of armed robbery. The prosecutor testified that if the defendant pled guilty as charged, that he would not be prosecuted as a multiple offender, but that if he elected to go to trial and lost, he would be prosecuted as a multiple offender. See Tr. 5-8.

The defendant cites *Haves v. Cowen*, 547 F.2d 42 (5th Cir. 1976), which presents a different factual situation from the instant case. In *Hayes, supra*, the prosecutor increased the original charges to a more serious offense after the defendant's refusal to plead guilty. The facts of this case are different from those presented to the court in *Hayes*. Here, the defendant was prosecuted under an existing indictment. Defense counsel was advised that the defendant had a choice of pleading guilty as charged without facing the enhanced penalty provisions of L.R.S. 15:529.1, or going to trial and risking the possibility of an enhanced penalty if he was found guilty. This was part of a plea bargaining process, in which prosecutors have reasonable flexibility. An offer to forego pursuing a multiple offender bill is within constitutional limits. See *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978). Furthermore, the prosecutor need not have even made the choice until after the trial, without ever having given the defendant a choice. See La.R.S. 15:529.1. As such, the court does not find that the defendant's constitutional right to due process was violated by the actions of the prosecutor.

Claims 2, 3 and 4:[1]

In these claims, the petitioner contends that: (1) the trial court failed to inform him of his right to be tried as to the truth of the multiple offender allegations; (2) the trial court failed to inform him of the requirement to say whether the allegations were true; and (3) the trial court erred in allowing the defense counsel, rather than petitioner himself, to enter the plea.

The Constitution requires that, in sentencing procedures, a state provide an alleged habitual criminal with reasonable notice and an opportunity to be heard. See *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (1977). Louisiana has enacted R.S. 15:529.1 which contains procedures to be followed for habitual offender proceedings.

In this case, the State followed the provisions of 15:529.1 in that the defendant was given notice by the State filing a formal bill of information, alleging that the defendant was a multiple felony offender, with the bill also setting out the details of his prior felony convictions. (See State's Answer, Attachment No. 5) The defendant was thereafter called before the court to answer this bill of information, at which time the defendant waived

[1] The court fails to see any constitutional significance in the allegations in claims 2 and 3 and considers claim 4 to encompass whatever objection the plaintiff intended to make in claims 2 and 3. There are no technical, statutory, constitutional or magic words which the judge is required to recite. It is sufficient that the defendant was presented with the charges and asked to plead and then given an opportunity to refute those charges should he have chosen.

arraignment and through counsel entered a plea of not guilty to the habitual offender bill. (See State's Answer, Attachment No. 6) Thereafter a hearing was held and evidence presented from which the court was able to determine that the defendant was in fact a second felony offender. (See State's Answer, Attachment No. 7)

It is sufficient that the defendant was present at the arraignment on the bill with his attorney and that through his attorney he entered a plea of not guilty. Because he denied the allegations, a hearing was subsequently held which provided the defendant a full opportunity to be heard on all matters. There is no authority to suggest that either Louisiana law or constitutional due process requires that the defendant himself has to utter his plea or denial.

Claim No. 5:

The defendant contends that the trial judge knew that a multiple offender charge was forthcoming against the petitioner and failed to advise him not to incriminate himself as to his prior felony convictions during testimony given at the armed robbery trial.

At a habitual offender proceeding, the state must prove, among other things, that the defendant was convicted of a prior felony. See *State v. Sylvas*, 558 So.2d 1192 (La. App. 1st Cir. 1990). *Prima facie* proof of a prior felony conviction may be established by compliance with the state's statute. However, this is not the exclusive method of proving a prior felony conviction, and any other competent evidence may be used to establish such proof. See *State v. Moten*, 510 So.2d 55 *writ denied*, 514 So.2d 126.

The defendant was clearly under oath and sworn to tell the truth at his armed robbery trial. At that trial, the defendant was represented by counsel. Both the defendant and his counsel were informed by the prosecutor of potential habitual offender charges being brought if the defendant chose to go to trial. The defendant was under oath when he made the incriminating statements, not the subject of an interrogation at which he was unrepresented by counsel. The petitioner's argument is misplaced. *Boykin* assures that guilty pleas are given voluntarily. Here, the defendant pled guilty neither to armed robbery or the multiple offender bills. A guilty plea in state court is susceptible to a constitutional challenge that it was not voluntarily made if it can be shown that the defendant was not first advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 1712 (1969). However, the Fourteenth Amendment does not require that a state defendant be informed of habitual criminal charges prior to his conviction on a primary charge. See *Westling v. Bennett*, 410 F.2d 205 (C.A. Iowa 1969), *cert denied*, 90 S.Ct. 384; *Stewart v. Cunningham*, 550 A.2d 96. As such, at the defendant's trial on the primary charges of armed robbery, he was free to testify or not to testify as he chose while the court had no duty to warn him prior to his testimony that the State of Louisiana might file a habitual offender bill. Since the statements clearly were not taken in violation of any constitutional protections, neither does their introduction as evidence of his prior convictions for purposes of the habitual offender sentencing offend the Constitution. The only due process requirements attached to the multiple

offender hearing are that the defendant be given notice and a chance to controvert the allegations and both were complied with. There was no constitutional violation involved. Furthermore, the court finds that the *Boykin* decision is totally inapplicable here since, with the assistance of counsel, the defendant exercised his rights to refute the charges both as to the primary charges and as to the habitual offender bill.

Claim No. 6:

Under Louisiana law relating to habitual offender proceedings, it is required that the prior felony conviction and the defendant's identity be proved. In this case, the state presented evidence which established defendant's prior felony convictions sufficiently to satisfy constitutional safeguards. Whether or not a prior felony conviction ended in a pardon is not upon the state to prove. Should the defendant contend he had been pardoned, the burden would have fallen on him to make this assertion and establish it to the satisfaction of the court. See *Foots v. State of Louisiana*, 793 F.2d 610 (5th Cir. 1986).

Claim No. 7:

Defendant alleges that he was determined to be a multiple felony offender on the basis of improper evidence. Fundamental requirements of due process, when a habitual criminal statute is to be invoked, are reasonable notice and an opportunity for a full and complete hearing with the right to the aid of competent counsel. See *Johnson v. State of Kansas*, 284 F.2d 344 (8th Cir. 1960). The evidence presented in this case included conviction

records from the State of Mississippi with fingerprints. The State also presented an expert witness who positively identified the fingerprints in the conviction records to match those of the defendant. The court did consider as well the defendant's testimony at his primary trial and concluded that the defendant was the same person and was therefore a second felony offender. This procedure, as dictated by the laws of the State of Louisiana, meets the due process requirements of the Fourteenth Amendment to the Constitution.

Claims No. 8 and 9:

After determining that defendant was a second felony offender, the court concluded the penalty range to be from 33 years to 198 years, without benefit of parole or suspension of sentence. In determining the exact number of years, the trial judge should apply the provisions of the Code of Criminal Procedure, Art. 894.1. Section 64 of the Louisiana Criminal Code mandates that the court impose a sentence in armed robbery cases of not less than 5 years nor more than 99 years and further requires that the sentence be without benefit of parole, probation or suspension. The sentencing guidelines for determining appropriate sentences in a particular case are set forth in Louisiana Code of Criminal Procedure, art. 894.1. The defendant argues that R.S. 15:529.1(A)(i),[2] the Multiple Offender Statute, does not prohibit parole for Second

[2] La.R.S. 15:529.1(A)(1) provides in part: "... upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."

Offenders, and, as such, the trial judge erred in prohibiting parole. The petitioner's original sentence was for Armed Robbery, R.S. 14:64, a sentence which *prohibits* parole. The judge's apparent interpretation of the laws, when applied in conjunction, gave him the *discretion* to allow for parole according to the circumstances. That the petitioner disagrees with the judge's interpretation provides no basis for federal habeas corpus relief since no question of a constitutional nature is raised. *Carrizales v. Wainwright*, 699 F.2d 1053 (1st Cir. 1983); *Jones v. Theriot*, 846 F.2d 457 (7th Cir. 1988).

The petitioner further argues that the trial court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by C.Cr.P. art. 894.1. This court is also foreclosed from consideration of the alleged failure to follow the state's sentencing procedures because such failure is not a constitutional question reviewable on a federal habeas corpus petition. *Jones v. Estelle*, 622 F.2d 124, 126 (5th Cir. 1980), *cert. denied*, 449 U.S. 996, 101 S.Ct. 537 (1980).

Accordingly,

IT IS RECOMMENDED that the petition for a writ of habeas corpus be **DENIED.**

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond

to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) business days from the date of its service, or within the time granted pursuant to Fed.R.Civ.Proc. 6(b), shall bar an aggrieved party from attacking the factual findings on appeal except upon grounds of plain error or manifest injustice. See *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 2nd day of February, 1994.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES
MAGISTRATE JUDGE

COPY SENT
DATE 2-2-94
BY crw
TO: Trest
Bullers

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

(Filed Feb. 13, 1994)

NOW INTO COURT COMES RICHARD FRANKLIN TREST (Petitioner herein) objecting to Magistrate Judge Payne's Report and Recommendation. Said Report and Recommendation is dated February 2, 1994, and received by Petitioner at the Lousiana State Penitentiary, Angola, Louisiana on or about February 9, 1994. Petitioner objects as follows:

1.

Petitioner's writ of habeas corpus raised nine (9) specific claims and the Report and Recommendation recommended that all nine claims be dismissed. Therefore, Petitioner will make a general objection relative to all nine (9) claims.

2.

Petitioner, (like many, who are incarcerated in the Louisiana State Penitentiary, Angola, Louisiana) is not knowledge in the science of law. Petitioner had been assisted by one of Angola's Writ Writers. Claim 7 in the writ is based upon two parts, titled A and B. The Report

and Recommendation did not address section B of claim 7. A review of the writ(s) that were raised in State and Federal Court; unskilled and obscurely raised in subsection B of Claim 7 is a substantial violation that warrants review by this court. In essence, Petitioner has raised the issue that his prior conviction in the State of Mississippi was judicial [sic] deficient in that the prior guilty plea was unconstitutional, because it did not comply with constitutional safe-guards.

3.

Petitioner is currently incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. Petitioner was charged by Bill of Information for Armed Robbery, a violation of LSA-R.S. 14:64. After the conclusion of trial, Petitioner was found guilt [sic]. The State of Louisiana then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging Petitioner as a Second Offender. Petitioner was subsequently convicted and sentenced to an enchancement [sic] term of thirty-five (35) years without benefit of parole, probation, or suspension of sentence due to Petitioner's prior guilty plea in the State of Mississippi. Petitioner asserted this claim in section B of Claim 7 in his post conviction/writ of habeas corpus in the State Court(s), and maintained the exact posture in this court. The claim resting in muddy waters is nevertheless well preserved. However, the Magistrate Judge's Report and Recommendation failed to address this claim. Petitioner objects and moves for review of this claim.

4.

The State of Louisiana denied Petitioner due process of law when failing to comply with the standards announced in *State v. Santiago,* La. 416 So. 2d 524 that a guilty plea in a Louisiana State Court subsequent to December 8, 1971 (date of *State ex rel. Jackson v. Henderson,* 260 La. 90, 255 So. 2d 85 (1971) became final) may not be used to enhance punishment in a habitual offender proceedings unless the record affirmatively discloses that the plea was constitutionally valid. *State v. Holden,* 375 So. 2d 1372 (La. 1979).

The State Court(s) failed to hold an evidentiary hearing on this claim.

5.

On May 24, 1976 in the State of Mississippi, Country [sic] of Jackson, Pascagoula, Mississippi in the Circuit Court of Jackson County, Mississippi with the Honorable Darwin M. Maples, Presiding Judge appeared three teen-age defendants ages 17 and 18 by the name of St. Clair Locke, Richard Trest, and Tommy Bryant. Each defendant was represented by counsels.

The three teen-age defendants entered guilty pleas and the court subsequently imposed sentence.

The guilty plea entered by Richard Trest is constitutionally deficient in that the plea does not conform to *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709.

The Court failed to advise Petitioner that:

1. By pleading guilty, he waived his rights to trial by jury, privilege against compulsory self-incrimination, and his right to confront accusers. See Page 5 of the Mississippi Boykin transcript attached. The record indicates that the court advised the two codefendants, but did not petitioner to these basic rights.

The United States Supreme Court held in *McCarthy v. United States*, 89 S.Ct. 1166 (1969) that a defendant who waives these basic rights, it must be an intentional relinquishment or an abansoment [sic] of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant posses [sic] an understanding of the law in relation to the facts.

2. The court failed to inquire if the plea was voluntarily coecered, [sic] or as a results [sic] of threats and intimidation.

3. The court failed to advise that if Petitioner elected to be tried by jury and found guilty that he would have a right to appeal. And, if he couldn't afford an attorney, one would be appointed.

4. The court failed to advise Petitioner of the minimum and maximum sentence. See the following excerpt given by the court:

BY THE COURT

I could give some of you up to ten or thirty or forty years in the penitentiary; this is the type of crime you have committed. It's very serious. (See Miss. Boykin Tr. p. 8 attached).

In *Fortia v. United*, 456 F. 2d 194 (1972), the Court held that the records did not show that *Fortia* was informed of the maximum possible sentences that could be imposed. A guilty plea is invalid as not being understanding entered if a defendant does not know the maximum penalty possible for the offense. *United States ex rel. Hill v. United States*, 5th Cir. 1971, 452 F. 2d 664, *United States v. Perwo*, 5 Cir. 1970, 433 F. 2d 1301.

The Louisiana Supreme Court set the standards in *State v. McGinnis*, La. 413 So. 2d 1307 as to non-Louisiana and federal pleas of guilty. On rehearing this court held that the records failed to show that the defendant was ever informed of his privilege against self-incrimination in the prior conviction which was later used for enhancement purpose in a Louisiana Multiple Offender hearing. The court reversed and remanded.

5. Court gave contradictory instructions as to the charges pending against Petitioner and Tommy Bryant. See the following excerpt:

BY THE COURT

All right, Trest and Bryant, you have been indicted on four charges, and the other defendant, Locke, you have been indicted on me. Do you understand that? (Miss. Boykin Tr. page 2, Lines 6-9)

BY THE COURT

Now, the other two defendants, you are charged with burglary and larcency [sic] on five offenses. Do you understand that, Bryant? Trest? (Miss. Boykin Tr. p. 6, Lines 15-17).

The Court had explained to St. Clair Locke that he was charged with one count. See (Miss Boykin Tr. pp. 2 & 6).

In *Banks v. McGougan*, 717 F. 2d 186 (1983) the court held at p. 190-191 that it is necessary, however that the record show that the plea was intelligently and voluntarily made citing *McChesney v. Henderson*, 484 F. 2d 1101, 1106 (5th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed. 2d 102 (1974).

6. The Court failed to informed [sic] Petitioner of the essential elements of the crime even tho [sic] the court requested a recitation of the facts of each offense.

The constitution requires that the accused be informed of the elements of the crime charged. *Henderson v. Morgan*, 426 U.S. 637, 96 2253, 49 L.Ed. 2d 108 (1976).

In *Boykin v. Alabama*, supra the court held that a guilty plea is not valid unless it is an intelligent and voluntary choice on the part of the accused. The *Boykin* decision explains that a guilty plea constitutes a conviction without a trial; for that reasons, [sic] a defendant should be made aware of the rights that are automatically waived by choice to forego trial; the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. As interpreted by the La. S.Ct., the *Boykins* decision requires *"an express and knowing waiver of at least these three federal constitutional rights". State ex rel Jackson v. Henderson*, supra.

The decision to plea guilty is not deemed an intelligent and understanding choice unless the defendant is informed of the rights which attach at trial. While an understanding of the triad of rights may be the sine qua non for the acceptance of a guilty plea, it is also true that other factors may have a bearing on the validity of the plea. A mere recitation of rights does not always insure the intelligent and voluntary nature of the plea. For evidentiary purposes, the record must contain an affirmative showing that demonstrates the understanding and voluntary nature of the plea. *State v. Halsell*, 403 So. 2d 688 (La. 1981).

For the reasons cited herein this Court is respectfully requested to consider section B of Claim 7. The issues presented herein are not new, the claim was properly raised and preserved throughout the course of the post conviction/writ of habeas corpus application – the essential facts were raised unskillfully and obsured, [sic] but nevertheless raised and preserved.

WHEREFORE a review and disposition is warranted. Petitioner submits that he is entitled to relief.

Respectfully submitted,

/s/ Richard F. Trest
Richard Franklin Trest
D.O.C. #91171
Pine #4
La. State Penitentiary
Angola, Louisiana 70712

(Attachments Omitted)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

JUDGEMENT

(Filed May 16, 1994)

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, having thoroughly reviewed the record, including the written objections filed, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that petitioner's application for a writ of habeas corpus is **DENIED**.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 13th day of May, 1994.

/s/ Tom Stagg
TOM STAGG,
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40515

RICHARD F. TREST,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden, Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed May 15, 1995)

ORDER:

IT IS ORDERED that the Federal Public Defender, Western District of Louisiana is appointed counsel to represent the above captioned Appellant, to prepare supplemental briefs, and to present oral argument.

/s/ John M. Duhe Jr.
JOHN M. DUHE JR.
UNITED STATES
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-4314
604 CAMP STREET
NEW ORLEANS, LA 70130

May 18, 1995

Ms. Rebecca L. Hudsmith
Federal Public Defender
102 Versailles, Ste. 320
Lafayette, La 70501

No. 94-40515 Richard F. Trest v. John P. Whitley

Dear Ms. Hudsmith:

The Court has determined that counsel should be appointed to represent the appellant in this cause and has entered the enclosed order appointing you.

In accordance with FRAP and Local Rules 31, appellant's supplemental brief should be filed within 40 days from this date. Appellee's brief is due for filing 30 days after service of your brief upon them.

For your use in preparing and filing a supplemental brief, the one volume record on appeal is enclosed and a set of the briefs on file. You may retain the briefs for your personal files but we ask that the record be returned to this office at the time your brief is forwarded for filing.

The Court does direct that the supplemental briefs address the *Curtis* issue. ___ U.S. ___, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

After completion of the supplemental briefing schedule, the case will be assigned to the oral argument calendar.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By /s/ Joan Perkins
Joan Perkins
Case Manager

JP:lmc
encls.
cc w/encls.: Mr. Richard F. Trest
#91171
Pine 4, Camp C
Angola, LA 70712

Mr. James M. Bullers
District Attorney's Office
P.O. Box 69
Bento, LA 71006

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40515

RICHARD F. TREST

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Sept. 17, 1994)

Before JONES, STEWART, and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Richard F. Trest ("Trest") appeals the district court's denial of his petition for a writ of habeas corpus. Because his petition raises forfeited claims that are procedurally barred from review by this court, the judgment of the district court is AFFIRMED.

FACTUAL BACKGROUND

After a jury trial, Trest was convicted in 1979 of armed robbery in Bossier Parish, Louisiana. Three years before this conviction Trest had pleaded guilty to five felony counts of burglary in Mississippi. The Mississippi state court sentenced Trest to serve concurrent four year

terms for his offenses, and he was released from prison in Mississippi in 1978. Based on these prior felony convictions for burglary in Mississippi, the Louisiana trial court adjudicated Trest an habitual offender and sentenced him to 35 years imprisonment, without possibility of parole, probation, or suspended sentence. *See* La. R.S. 15:529.1. Trest concedes that during his habitual offender proceedings he failed to object to the Louisiana court's reliance on the Mississippi convictions on the basis that these convictions were somehow constitutionally invalid. Trest did not appeal his convictions in Mississippi and has never challenged their validity in any Mississippi court, either on direct or collateral appeal. Rather, he served his concurrent sentences until he became eligible for release from prison.

Trest filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 30, 1991. In this petition, Trest alleges for the first time that the Louisiana trial court erred in relying on his prior Mississippi convictions because these predicate convictions were unconstitutional. Specifically, Trest contends, *inter alia*, that because the Mississippi court purportedly failed to advise him of his constitutional rights and of the maximum sentence he could receive, the convictions used to enhance his Louisiana sentence were constitutionally infirm.[1] To support his petition, Trest submitted a copy of

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[1] To buttress the claim that the Mississippi convictions are somehow unconstitutional, Trest relies on *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969), in which the Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

the habitual offender bill of information filed against him and the transcript of the hearing on this bill. The government did not respond specifically to this potential ground for relief in its answer to Trest's petition. Likewise, the magistrate judge's report and recommendation did not directly address the issue. Trest stressed this silence in his objections to the report and recommendation. While Trest acknowledged that his claim had been poorly articulated, he rearticulated it, and attached for the district court a copy of the transcript of his 1976 guilty pleas in Mississippi state court. After considering Trest's petition for writ of habeas corpus, the district court denied it.

DISCUSSION

When considering requests for federal habeas corpus relief, this court has frequently explained that we review the district court's factual findings for clear error, but review issues of law de novo. *See, e.g., Myers v. Johnson*, 76 F.3d 1330, 1333 (5th Cir. 1996).

In the instant case, however, this court's decision in *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995), precludes us from reviewing the merits of Trest's habeas challenge to the constitutionality of his Mississippi convictions because his petition raises claims that were forfeited by Trest and are procedurally barred from appellate scrutiny.[2] In *Sones*, this court held that an inmate who had been sentenced under Mississippi's habitual offender

[2] Inexplicably, neither of the parties cited *Sones* or discussed it in their briefs, oral arguments, or memoranda to this court.

statute to life in prison without parole was properly denied habeas relief for his claim that his trial counsel was constitutionally ineffective because this claim would have been time barred had it been included in a state petition for habeas and, thus, was procedurally defaulted for purposes of federal habeas. *Sones*, 61 F.3d at 416.

The procedural default in *Sones* is replicated in the instant appeal. As *Sones* observes, Mississippi imposes the following procedural bar on all efforts at collateral relief from a conviction and sentence:

> A motion for relief under this chapter shall be made within three yeas after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, *or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.*

Miss. Code Ann. § 99-39-5(2) (emphasis added); *Sones*, 61 F.3d at 417 (emphasis added); *see also, Lott v. Hargett*, 80 F.3d 161, 163 (5th Cir. 1996). In *Odom v. State*, 483 So.2d 343 (Miss. 1986), the Mississippi Supreme Court declared that this procedural bar applied prospectively to all convictions occurring prior to April 17, 1984, the statute's effective date; hence, Mississippi convictions before April 17, 1984 can be challenged collaterally only if the challenge is filed in a petition for post-conviction relief by April 17, 1987. *Sones* further explains that Mississippi's procedural bar also extends to constitutional challenges against the predicate convictions triggering habitual offender status:

> the Mississippi Supreme Court has consistently held that an attack on a facially valid prior conviction, used either as an aggravating circumstance in capital sentencing *or as a basis for a sentence as a habitual offender, must be brought after sentencing in a petition for post-conviction relief* from that prior judgment of conviction.

See Sones, 61 F.3d at 418 n.14 (emphasis added); *see also, Phillips v. State*, 421 So.2d 476 481 (Miss. 1982); *Culberson v. State*, 612 So.2d 342, 343-47 (Miss. 1992).

Because Sones did not challenge the prior convictions used to trigger the career offender enhancement in petitions for post-conviction relief filed within the three-year statute of limitations, this court considered the challenge forfeited. We reasoned that,

> [f]or the first time on appeal, *Sones's counsel argues that his prior convictions are void on their face for failing to indicate whether the guilty pleas on which they were based were knowing and voluntary. We consider this novel argument forfeited.* Although we may consider a forfeited claim if it presents a purely legal question and if failure to consider it will result in manifest injustice, the issue whether Sones's prior convictions were based on voluntary and knowing pleas is not purely a question of law. . . . Because this issue thus involves factual as well as legal questions, *we will not consider it for the first time on appeal.*

Sones, 61 F.2d at 419 n.18 (citations omitted) (emphasis added); *see also, Lott*, 80 F.3d at 164-66 (inmate in Mississippi denied federal habeas corpus review of his *Boykin* claim because Mississippi's procedural default statute is

an independent and adequate rule barring such review).[3] Indeed, the importance of enforcing Mississippi's procedural bar and of preventing the retrial of the predicate offenses used to trigger a habitual offender enhancement has been reiterated by the Mississippi Supreme Court, which has stressed that

> [i]n fulfilling its mission to determine whether a prior conviction is constitutionally valid for the purpose of enhancing a defendant's sentence, the trial court must not be placed in position of 'retrying' the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely

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[3] Indeed, because Sones's attorney could not have raised these forfeited challenges to the prior convictions at sentencing for the enhanced conviction, this court denied Sones's habeas claim that he suffered from constitutionally ineffective counsel. As the panel explained,

> [c]ounsel therefore could not have successfully challenged the constitutionality of the prior convictions in the sentencing phase; as mentioned above, in Mississippi constitutional challenges to the validity of prior convictions that are not facially invalid must be made collaterally, and Sones has never sought collateral relief from the prior convictions that qualify him as a habitual offender. We perceive no attorney constitutional ineffectiveness. . . . Accordingly, we reject Sones's contention that denying federal review of his Sixth Amendment claim would result in a fundamental miscarriage of justice.

Sones, 61 F.3d at 420. Trest confronts precisely the same predicament as he has never challenged the prior convictions that qualify him as a habitual offender in any post-conviction or collateral proceeding in Mississippi.

> concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status.

Phillips v. State, 421 So.2d 476, 481-82 (Miss. 1982); *Sones*, 61 F.3d at 419.

For the same reasons that Sones was procedurally barred from challenging the prior convictions used to trigger his career offender enhancement, Trest is likewise barred. As has been discussed, while Trest was convicted in 1979 for armed robbery in Louisiana, his prior convictions occurred in Mississippi. The Mississippi convictions that provided the basis for the enhancement of the Louisiana sentence arose as a result of Trest's pleas of guilty to five counts of burglary on May 24, 1976. Trest neither appealed these convictions nor challenged them collaterally. Although he was sentenced to serve concurrent four year terms of imprisonment on the five counts, he left prison when he became eligible for release, in February of 1978.

Mississippi's procedural bar, the Mississippi Supreme Court, and this court in *Sones* mandate that Trest had until April 17, 1987 to file a petition for post-conviction relief from his Mississippi convictions. Since Sones did not comply with this requirement, his challenges to the constitutionality of his Mississippi convictions have been procedurally defaulted. Put differently, because the potential remedies in Mississippi courts for the constitutional defects alleged by Sones were rendered unavailable by his own procedural default, federal courts, including those in Louisiana, are barred from reviewing these

claims. *Sones*, 61 F.3d at 416; *Lott*, 80 F.3d at 164. As the Supreme Court has instructed,

> [I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, . . . [then] there is a procedural default for purposes of federal habeas.

Coleman v. Thompson, 501 U.S. 722, 735 n.1; 111 S.Ct. 2546, 2557 n.1 (1991).

The only potential remedies available to cure Trest's procedural default are to demonstrate either cause and prejudice for the default or that a fundamental miscarriage of justice will result from our failure to analyze his claims. Again, the Supreme Court has explained that procedural default will block all federal review of a claim that a conviction was unconstitutional unless the prisoner "can demonstrate *cause for the default and actual prejudice* as a result of the alleged violation of federal law, *or* demonstrate that failure to consider the claims will result in *a fundamental miscarriage of justice.*" *Coleman*, 501 U.S. at 750, 111 S.Ct. at 2565 (emphasis added). In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional. As a result, this court is bound to conclude as we did in *Sones:* "section 99-39-5(2) functions as an independent and adequate procedural bar to review [of the

constitutional claims raised by Trest] in federal court." *Sones*, 61 F.3d 410, 417-18; *see also, Lott*, 80 F.3d at 165.

Because this court concludes that it is foreclosed from considering the merits of Trest's habeas petition, we need not decide whether *Custis v. United States*, ___ U.S. ___, 114 S.Ct. 1732 (1994) would entitle Trest, had he not procedurally defaulted, to review in a federal habeas corpus proceeding of his claim that his prior Mississippi convictions were unconstitutional and that, as a result of this alleged constitutional infirmity, his current sentence has been improperly enhanced.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying Trest's petition for federal habeas corpus relief is **AFFIRMED.**

ROBERT M. PARKER, Circuit Judge, dissenting:

The independent and adequate state ground doctrine applies to bar federal habeas corpus relief when a state court declines to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). For the independent and adequate state ground doctrine to apply, the state court adjudicating a habeas petitioner's claims must explicitly rely on a state procedural rule to dismiss the Petitioner's claims. *Sones v. Hargett* 61 F.3d 410, 416 (5th Cir. 1995). The procedural default doctrine presumes that the state court's express reliance on a procedural bar functions as an independent and adequate ground in support of the judgment. *Id.* The petitioner can rebut this presumption by establishing that the procedural rule is not strictly or regularly followed. *Id.; see also, Moore v. Roberts*, 83 F.3d 699 (5th Cir. 1996). Additionally, Petitioner might defend his position by demonstrating cause and prejudice for his failure to raise the claim in state proceedings. *See Gray v. Netherland*, 116 S.Ct. 2074, 2082 (1996). By failing to raise the procedural default as a defense, the State lost the right to assert that defense. *Id.*

In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

For these reasons, I dissent from the majority's holding that petitioner was procedurally barred from challenging the prior convictions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted)

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Oct. 29, 1996)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09/17/96, 5 Cir., ___), ___ F.3d ___)

Before JONES, STEWART and PARKER, CIRCUIT JUDGES.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en

banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

ROBERT M. PARKER, Circuit Judge, Dissenting